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JAN 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1034

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GUY W. BRAIN, et al.,
Petitioners,

v.

ROADWAY EXPRESS, INC., et al.,
Respondents.

On Petition For Writ of Certiorari
to The United States Court of Appeals
For the Sixth Circuit

BRIEF IN OPPOSITION

For Respondents, Central Conference of Teamsters, Truck Drivers Local Union No. 407, Joint Council No. 41, Teamsters National Freight Negotiating Committee, and Joint State Cartage Committee

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QUESTIONS PRESENTED

(1) Whether the Court should review a determination of a lower Court which held that Petitioners' attempt to exhaust internal union remedies against Local Union officials did not toll the applicable statute of limitations?

(2) Whether the Court should review a determination of a lower Court according finality to the Local Union's decision to withdraw grievances that had been settled and to the decision of the Joint State Committee, held to have had jurisdiction over the dispute?

(3) Whether the Court should review the decision of a lower Court which concluded that Petitioners' section 301 action was, as held by the District Court, time-barred under the three-month state statute of limitations, applicable under *United Parcel Service, Inc.* v. *Mitchell*, 457 U.S. 56 (1981), and also under the six-month federal period of section 10(b), 29 U.S.C. § 160(b), application of which was deemed appropriate in *Delcostello* v. *International Brotherhood of Teamsters*, ____ U.S. ____, 103 S.Ct. 2281 (1983)?

(4) Whether the Court should address the question of *Delcostello's* retroactive application in this case, where the question was not squarely presented on appeal and was neither briefed for nor argued to the Court of Appeals?

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BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This action arose under section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185. Petitioners, all former dockworkers employed at the Cleveland, Ohio terminal of Respondent, Roadway Ex-

press, Inc. (hereinafter sometimes referred to as "Roadway" or "Company"), sought relief from Roadway and from the following additional parties, all of which are Respondents herein: Truck Drivers Local Union No. 407 (hereinafter referred to as "Local 407"), a labor organization in which Petitioners held membership and which, with Roadway, was signatory to the National Master Freight Agreement and Central States Area Local Cartage Supplemental Agreement, effective April 1, 1979 to March 31,1982 (hereinafter referred to as the "NMFA" or "contract"); Teamsters Joint Council No. 41 (hereinafter referred to as "Joint Council"); Teamsters National Freight Negotiating Committee (hereinafter referred to as "Negotiating Committee"); and the Freight Division, Central Conference of Teamsters (hereinafter referred to as the "Central Conference").

In 1977, Roadway opened a terminal in Copley, Ohio. In the spring of 1978, Roadway began transferring some of its work from its Cleveland terminal to other terminals in its system, including its Copley terminal. In May, 1978, nine (9) of the Petitioners and several other dockworkers filed grievances with Local 407 protesting the movement of work to the Copley terminal and requesting, *inter alia,* back pay. These grievances alleged that work was being transferred to the Copley terminal without proper authorization from the Change of Operations Committee as required under the NMFA.

Pursuant to the grievance machinery set forth in the NMFA, the grievances were processed to the local level hearing, where they were deadlocked. Thereafter, the grievances advanced to the Joint State Committee level of the grievance procedure. The grievances were also deadlocked at the Joint State Committee level and thus were to advance to the Joint Area Committee for disposition. The

grievances were scheduled to be heard by the Joint Area Committee on September 22, 1978.

However, the Joint State Committee, composed of an equal number of management and labor members, sent the deadlocked grievances back to the parties for resolution. Local 407 and Roadway settled the grievances on September 14, 1978, several days before the scheduled hearing before the Joint Area Cartage Committee. Roadway paid eight (8) hours wages to three dockworkers who had not been called for work on the days in question.

Roadway continued to transfer work from the Cleveland terminal to other terminals. In December of 1978, workers at the Cleveland terminal began to be laid off. Five (5) of the Petitioners filed grievances at various times in January, February and June, 1979, alleging that the work being transferred to the Copley terminal was without proper authorization from the Change of Operations Committee and protesting their respective layoffs.

These grievances were deadlocked at the Joint Local Committee level. A hearing before the Joint State Committee was conducted on July 19, 1979. Concluding that there has been no violation of the collective bargaining agreement with respect to the transfer of work, the Joint State Committee denied the grievances. Five of the grievants (5), four of whom are Petitioners herein, participated in the hearing and were present when the decision denying their grievances was announced.

On or about November 15, 1979, Petitioners filed internal union charges against three officers and a business agent of Local 407. These charges alleged that the officers and agent had breached the duty of fair representation and had violated the Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Help-

ers of America (hereinafter referred to as I.B.T.), and the Bylaws of Local 407, with regard to the handling of the grievances in the transfer of work dispute with Roadway. No internal union charges were filed against the Negotiating Committee, the Joint State Committee, the Central Conference, or any of their respective officers.

The internal union charges were processed in accordance with the appeals procedure set forth in the I.B.T. Constitution. After the charges were dismissed, Petitioners appealed to the General Executive Board of the I.B.T. However, on December 18, 1980, while the internal union charges were pending before the General Executive Board of the I.B.T., Petitioners commenced this lawsuit. Subsequently, on January 30, 1981, the General Executive Board denied Petitioners' charges against the Local 407 officials.

The gravamen of the Complaint was that Roadway had breached the collective bargaining agreement by transferring work from the Cleveland terminal to its Copley terminal without approval of the contractually established Change of Operations Committee and that the subsequent transfer of Petitioners to the Copley terminal without "dovetailing" them into Copley's seniority list further violated the contract. Correspondingly, the Complaint also alleged that the defendant labor organizations breached their duty of fair representation by withdrawing Petitioners' grievances in September of 1978, by ineptly handling the grievances over the transfer of work to Copley, and by permitting the Company to transfer Petitioners to Copley without full seniority rights.

Respondents filed their respective Answers at various times between January 12, 1981 and March 30, 1981. On August 17, 1981, all six (6) Respondents filed Motions to Dismiss or, in the Alternative, for Summary Judgment on

the ground that Petitioners' section 301 action was time-barred under the applicable statute of limitations. On October 13, 1981, Petitioners filed a Memorandum in Opposition to Respondents' respective Motions.

On December 3, 1981, the District Court issued a Memorandum of Opinion and Order pursuant thereto, granting all Respondents' Motions for Summary Judgment and dismissing Petitioners' case. The District Court held that Petitioners' section 301 action was barred under Ohio's three-month statute of limitations for actions to vacate arbitration awards, Ohio Rev. Code § 2711.13.

On December 31, 1981, Petitioners filed a Notice of Appeal. On September 23, 1983, the United States Court of Appeals for the Sixth Circuit issued its Order and Opinion affirming the District Court's dismissal. Although concluding that the District Court had correctly granted summary judgment because Petitioners had failed to commence their suit within the 90-day period of Ohio Rev. Code § 2711.13, the Sixth Circuit Court of Appeals, relying on *Delcostello* v. *International Brotherhood of Teamsters*, ____ U.S. ____, 103 Supreme Court 2281 (1983), held that Petitioners' action, filed some seventeen (17) months after their claim arose, was time-barred under the six-month statute of limitations set forth in Section 10 (b) of the National Labor Relations Act, 29 U.S.C. § 160 (b). It is this decision for which Petitioners now seek a Writ of Certiorari.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I

The first set of grievances filed to protest Roadway's transfer of work from Cleveland to Copley, Ohio was settled and withdrawn by Local 407 in September, 1978. The Joint State Committee denied the second set of grievances on July 19, 1979. Thereafter, on November 15, 1979, some fourteen (14) months after resolution of the first set of grievances, and almost four (4) months after the resolution of the second set, Petitioners filed internal union charges against officials of Local 407. Petitioners argue that this belated attempt to exhaust internal union remedies against officials of one of the six (6) Respondents, undertaken prior to this Court's decision in *Clayton* v. *UAW*, 451 U.S. 679 (1981), should have tolled the statute of limitations.

Using this Court's approach in *Clayton*, the District Court held that the statute of limitations was not tolled because Petitioners' internal union procedures were inadequate either to reactivate their grievances or to award them the substantive relief sought. The District Court bolstered its conclusion against tolling by reference to *Geddes* v. *Chrysler Corp.*, 608 F.2d 261 (6th Cir. 1979), which foreshadowed *Clayton* by holding that exhaustion of internal union remedies is not a defense available to an employer. The Sixth Circuit Court of Appeals, without discussion, affirmed the District Court's rejection of Petitioners' tolling argument. Neither the District Court nor the Court of Appeals erred in rejecting Petitioners' argument that their attempt to exhaust internal union procedures tolled the applicable statute of limitations.

It is well settled that "under certain circumstances not

inconsistent with the legislative purpose", federal courts have the power to hold that a statute of limitations is tolled. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 559 (1974). *See also, Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424, 427 (1965). "[T]his Court has not hesitated to find the statutory period tolled or suspended" in cases "where the plaintiff has refrained from commencing suit during the period of limitations because of inducement by the defendant," . . . "or because of fraudulent concealment . . . ." *American Pipe & Construction Co., supra*, 414 U.S. at 559, *citing, Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231 (1959); and *Holmburg* v. *Armbrecht*, 327 U.S. 392 (1946).

However, none of the factors triggering equitable tolling are present in the instant case. At the time Petitioner's cause arose, there were numerous cases demonstrating the absence of concensus among the circuits as to whether exhaustion of internal union remedies was a prerequisite for the successful prosecution of a section 301 action. Furthermore, there is no evidence in this case that Petitioners did, in fact, rely upon the exhaustion principle and did, in fact, forego filing this action during the pendency of the internal union appeals procedures. To the contrary, Petitioners' actual conduct belies any such assertion.

In *Clayton*, this Court resolved the question "whether an employee should be required to exhaust internal union appeals procedures before bringing suit against a union or employer under § 301," 451 U.S. at 681, by holding that, except under very limited circumstances, it was not a prerequisite to the maintenance of section 301 action. This Court's decision did not mark a radical departure from settled case law or a clean break from a long line of precedent. On the contrary, this Court granted certiorari in *Clayton* because the circuits were divided on the issue of

whether exhaustion of internal union procedures was required before bringing suit under section 301. *Id.* at 684 n.5. *See also, Chambers* v. *Local Union 639,* 578 F.2d 375 (D.C. Cir. 1978); *Baldini* v. *Local Union No. 1095,* 581 F.2d 145 (7th Cir. 1978); *Buzzard* v. *Local Lodge 1040,* 480 F.2d 35 (9th Cir. 1973).

Prior to *Clayton,* some courts had fairly iron clad exhaustion rules. *See, e.g., Imel* v. *Zohn Mfg. Co.,* 481 F.2d 181 (10th Cir. 1973), *cert. denied,* 415 U.S. 915 (1974). However, many courts excused a failure to exhaust internal union remedies in a variety of circumstances. For example, some courts excused exhaustion where the internal union procedures were inadequate to produce the results sought, such as reactivation of the grievance. *See, e.g., Chambers* v. *Local 639,* 578 F.2d 375 (D.C. Cir. 1978). Other courts did not require exhaustion where union officials hearing the appeal would be so hostile to the employee that he or she could not hope to be given a fair hearing. *See, e.g., Willetts* v. *Ford Motor Co.,* 583 F.2d 852 (6th Cir. 1978); *Fizer* v. *Safeway Stores, Inc.,* 586 F.2d 182 (10th Cir. 1978); *Winter* v. *Local Union No. 639,* 569 F.2d 146 (D.C. Cir. 1977). Still other courts had held that the exhaustion doctrine was only applicable in cases involving purely internal union matters. *See, e.g., Brady* v. *Transworld Airlines,* 223 F.Supp. 361 (D. Del. 1963), *aff'd,* 401 F.2d 87 (3d Cir. 1968), *cert. denied,* 393 U.S. 1048 (1969).

The existence of multiple approaches and varying rules among the Circuit Courts of Appeal at the time Petitioners filed internal union charges clearly undermines their argument that exhaustion of such remedies was a necessary prerequisite to maintenance of a section 301 action. At that time, exhaustion was not a prerequisite for maintenance of this action; therefore, Petitioners' belated attempts to ex-

haust internal union remedies as against officials of one of the six Respondents did not toll the statute of limitations.

In addition, Petitioners were put on notice soon after their grievances were denied by the Joint State Committee that the Sixth Circuit Court of Appeals had severely limited the exhaustion rule. In *Geddes* v. *Chrysler Corp.*, 608 F.2d 261 (6th Cir. 1979), the Court held that a plaintiff's failure to exhaust internal union remedies was not available to the employer as a defense in a section 301 action for breach of contract. *Geddes*, which was decided prior to the filing of Petitioners' internal union charges, cast an unmistakable shadow of doubt over the applicability of the internal union exhaustion requirement as a defense to the union in a section 301 action.

Petitioners would have this Court believe that they were convinced that exhaustion of internal union remedies was a necessary prerequisite to the maintenance of a successful section 301 action. However, the chronology of Petitioners' collective activities with regard to the internal union charges exposes their own lack of conviction regarding the necessity of exhaustion. Although professing to believe that exhaustion of internal union remedies was a necessary prerequisite, Petitioners did not wait to file suit until after the I.B.T.'s General Executive Board had reached a final decision on Petitioners' internal union charges. On the contrary, Petitioners filed their section 301 suit on December 18, 1980, approximately six (6) weeks prior to the decision of the I.B.T. General Executive Board; over two (2) years after the first set of grievances were settled by Local 407; and approximately one and one-half years after the Joint State Committee denied their second set of grievances. Petitioners' own conduct is inconsistent with the argument that they have advanced throughout these proceedings with regard to the tolling of the statute of limitations.

Moreover, it bears mentioning that the record itself is devoid of any evidence indicating that Petitioners actually did forego the filing of a lawsuit based upon a determination that exhaustion of internal union remedies was required. In their Petition, as in their earlier written submissions, Petitioners only argue that reasons existed upon which they could rely, and not that they did in fact rely on any of those reasons.

Finally, implicit in Petitioners' argument is that the filing of internal union charges against individual officers of Local 407 was sufficient to toll the statute of limitations period for all of the Respondents. Such an argument is totally unfounded and lacking in legal efficacy. No charges were filed against the Negotiating Committee, the Joint State Committee, the Central Conference, or any of their respective officers. No agency relationship existed between any of these Respondents and Local 407. Since Petitioners did not file internal union charges against any of these Respondents, their implicit argument that the statute of limitations should have been tolled with respect to these Respondents is wholly without merit.

Petitioners did not delay the filing of the instant action on the basis of well settled and uniform case law. They did not refrain from filing suit because of any inducement or misrepresentation or concealment on the part of any of the Respondents. They were, in no way, prevented from asserting their rights by filing suit within the applicable statute of limitations. Therefore, the lower Courts correctly determined that Petitioners' attempt to exhaust internal union remedies against four (4) officials of Local 407 did not toll the statute of limitations in this case.

II

Petitioners argue that the doctrine of finality was improperly accorded to the July 19, 1979 decision of the Joint State Committee, denying the second set of grievances because the Joint State Committee "was not the proper forum to make such a determination." Petition for Writ of Certiorari, 27-28. They contend that the subject of those grievances was within the sole and exclusive jurisdiction of the Change of Operations Committee pursuant to Article VIII, Section 6 (a) and (d) of the NMFA. *See,* Appendix E, Petition for Writ of Certiorari.

Joint Committee awards rendered pursuant to the trucking industry master agreements have long been afforded the full and binding effect of arbitration awards. *General Truck Drivers* v. *Riss & Co.,* 372 U.S. 517 (1963); *Humphrey* v. *Moore,* 375 U.S. 335 (1964); *Morris* v. *Werner-Continental,* 466 F.2d 1185 (6th Cir. 1972), *cert. denied,* 411 U.S. 965 (1973). Petitioners contend that the Joint State Committee's decision of July 19, 1979, is undeserving of finality because the Committee lacked jurisdiction over the grievances. They placed total reliance on Article 8, Section 6 (a) and (d) of the NMFA to support this contention.

However, as determined by the District Court, Petitioners' reliance is misplaced. As found by the District Court, and left undisturbed by the Sixth Circuit Court of Appeals, the Joint State Committee is vested with the power to decide issues of seniority pursuant to Article 8, Section 6 (g) of the NMFA. Section 6 (g), which Petitioners conspicuously omitted from Appendix E to their Petition, provides:

> Article 8, Section 6
>
> Intent of Parties (g) The parties acknowledge that the above rules are intended solely as general standards and further that many factual sit-

> uations will be presented which necessitate different application, modification or amendment. Accordingly, the parties acknowledge that questions of the application of seniority rights may arise which require different treatment and it is anticipated and understood that the Employers and Unions jointly involved and/or the respective grievance committees may mutually agree to such disposition of questions of seniority which in their judgment is appropriate under the circumstances. The Change of Operations Committees, as provided herein or in the Supplemental Agreements, shall have the authority to determine the application of seniority in those situations presented to them. In all cases the seniority decisions of the Joint Committees, including the Change of Operations Committees and Subcommittees, established by the National Master Freight Agreement and the respective Supplemental Agreements shall be final and binding.

Petitioners' argument that the decision of the Joint State Committee is undeserving of finality is predicated on their stubborn refusal to read Article 8, Section 6 in its entirety. Pursuant to Article 8, Section 6 (g), the Joint State Committee had full authority to hear the second set of grievances and to render a decision thereon. That decision, issued by the Joint State Committee on July 19, 1979, was final and binding, both pursuant to the express language of the contract and under the prevailing case law.

Petitioners also contend that the adjustment of the first set of grievances in September of 1978 should not be accorded finality. This argument is patently ridiculous. Taken to its logical conclusion, Petitioners' argument

would mean that neither an employer nor a union would be entitled to enter into any sort of final and binding agreement or a resolution of the grievance short of an arbitration or a Joint Committee decision. It would also mean that grievances adjusted without resort to arbitration or to Joint Committees for disposition could be reactivated indefinitely. This is obviously inconsistent with the federal labor policy in favor of "relatively rapid disposition of labor disputes." *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 707 (1966), *quoted in, United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 63 (1981). Petitioners' argument also flies in the face of the Congressional mandate, under which "final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." Section 203 (d) of the National Labor Relations Act, 29 U.S.C. § 173 (d).

The District Court and the Sixth Circuit Court of Appeals correctly accorded finality to the withdrawal of the first set of grievances in September, 1978, after they were settled by Roadway and Local 407. The District Court and the Sixth Circuit Court of Appeals also correctly accorded finality to the July 19, 1979 decision of the Joint State Committee, denying Petitioners' second set of grievances.

III

Petitioners contend that the Court of Appeals erred in applying *Delcostello* v. *International Brotherhood of Teamsters*, ____ U.S. ____, 103 S. Ct. 2281, 2285 (June 8, 1983), wherein this Court held that the six-month federal limitations period set forth in Section 10 (b) of the National

Labor Relations Act, 29 U.S.C. § 160 (b), "should be the applicable statute of limitations governing the [section 301] suit, both against the employer and against the union." Petitioners then launch into an analysis of the question whether *Delcostello* should, under the tripartite test of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), be applied retroactively.

Respondents submit that Petitioners' argument regarding the retroactive application of *Delcostello* is, in the context of this case, purely academic. The dismissal of Petitioners' section 301 action on timeliness grounds in the case at bar will remain totally unaffected even if Petitioners' argument against the retroactive application of *Delcostello* were determined to be meritorious. In reality, if *Delcostello* were to be applied prospectively only, a matter upon which these Respondents expressly decline to comment at this juncture, Petitioners' suit would nonetheless be time barred under the 90-day state statute of limitations, Ohio Rev. Code § 2711.13, as mandated under *United Parcel Service, Inc.* v. *Mitchell,* 451 U.S. 56 (1981), the predecessor to *Delcostello.*

Mitchell was decided during the pendency of this case before the District Court. All of the Respondents moved to amend their answers to assert the statute of limitations defense in light of *Mitchell* and the District Court granted their respective Motions. In sustaining Respondents' Motions for Summary Judgment, the District Court, relying on *Mitchell,* held that the statute of limitations applicable to this case was Ohio Rev. Code § 2711.13, the 90-day provision for actions to set aside arbitration awards, and accordingly, determined that Petitioners' Complaint, filed in excess of 17 months and as much as 27 months after their claims arose, was untimely filed.

On appeal, the Sixth Circuit Court of Appeals approved the District Court's reliance on *Mitchell* and upheld its dismissal of the action on the ground that Petitioners had failed to bring their suit within the 90-day period of § 2711.13. Only after it had deemed the District Court's disposition of the case correct under the 90-day state provision did the Sixth Circuit address the alternative basis for affirmance under *Delcostello*.

Petitioners apparently believed that if *Delcostello* is applied prospectively only, the timeliness of this suit will be governed not by *Mitchell*, but by the confused body of law antedating the *Mitchell* decision. They apparently take the view that *Delcostello*, while not to be applied retroactively, nonetheless renders *Mitchell* a nullity for all purposes or at least for purposes of this lawsuit.

Respondents submit that the fallacy of Petitioners' reasoning is self-evident. This Court certainly made no suggestion in *Delcostello* that *Mitchell* was an aberration to be treated as if it had never been rendered. No where in *Delcostello* did this Court hint that pre-*Mitchell* statutes of limitation should govern the timeliness question in pending section 301 actions. Petitioners have cited no authority in support of this peculiar notion.

In *Lawson* v. *Truck Drivers Local Union 100*, 698 F.2d 250 (6th Cir. 1983), rendered some eight (8) months before the Court of Appeals decision in the instant case, the Sixth Circuit held that *Mitchell* should be applied to section 301 actions pending against employers and unions. Finding none of the obstacles present under Michigan law to prevent application of that state's statute of limitations for vacating arbitrations awards, *see, Badon* v. *General Motors Corp.*, 679 F.2d 936 (6th Cir. 1982), and *Pitts* v. *Frito-Lay, Inc.*, 700 F.2d 330 (6th Cir. 1983), the *Lawson*

court held that "*Mitchell* applies retroactively to pending cases and . . . under *Mitchell* and *Badon* the Ohio statute of limitations governing suits to vacate arbitration awards applies to unfair representation actions against unions as well as to wrongful discharge actions against employers. 698 F.2d at 252.

Respondents submit that this section 301 suit is time-barred regardless of whether the timeliness question is determined by reference to the six-month federal provision of section 10 (b), as mandated under *Delcostello,* or to the 90-day provision of Ohio Rev. Code § 2711.13, as mandated under *Mitchell,* and as applied in Ohio. *See, Lawson* v. *Truck Drivers Local Union 100, supra,* 698 F.2d 250. Accordingly, the question whether *Delcostello* should be applied retroactively is one that will not affect the ultimate outcome of the case at bar and thus is not in the proper posture for review at the present time.

IV

The decision of the United States Court of Appeals for the Sixth Circuit, affirming dismissal of this lawsuit on statute of limitations grounds was consistent with prevailing law. The Respondents contend that the Court should decline to review that decision for any reason. Respondents further contend that review of the question whether *Delcostello* should be applied retroactively is particularly inappropriate under the facts and circumstances of this case.

Obviously, the question of *Delcostello's* retroactive application was not an issue on appeal. Moreover, this question was neither briefed in nor argued to the lower Court. Finally, the lower Court, itself, did not address the question of *Delcostello's* retroactive application in its decision, affirming the dismissal of this lawsuit. This question is being

squarely presented for the first time in the Petition for Writ of Certiorari. Respondents submit that the Court should decline to review this question which was not presented to the lower Court and which the parties herein would be arguing for the fiirst time in this the Court of last resort.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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